No. 7739

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—2-11-35

No. 7739

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Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—2-11-36

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

V. K. BUTLER, Jr., Esq.,

For Comm'r:

H. D. THOMAS, Esq.

Docket No. 55537

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1931

Apr. 6—Petition received and filed. Taxpayer notified. (Fee paid)

" 6—Copy of petition served on General Counsel.

" 28—Answer filed by General Counsel.

May 5—Copy of answer served on taxpayer. Circuit Calendar.

1933

Jul. 3—Hearing set for week of September 11, 1933 at San Francisco, Cal.

Sep. 19—Hearing had before Mr. Van Fossan on the merits. Submitted. Briefs due Nov. 5, 1933—no exchange.

Oct. 16—Transcript of hearing of Sept. 19, 1933 filed.

1933

Nov. 1—Motion for extension to 12/5/33 to file brief filed by taxpayer. 11/2/33 granted.

Dec. 2—Motion for extension to 12/26/33 to file brief filed by General Counsel. 12/5/33 granted both sides.

" 22—Motion for extension to 1/8/34 to file brief filed by taxpayer. 12/26/33 granted.

" 26—Memorandum brief filed by General Counsel.

1934

Jan. 8—Brief filed by taxpayer.

Apr. 27—Opinion rendered, Mr. Van Fossan, Div. 9. Decision will be entered under Rule 50.

Jun. 26—Notice of settlement filed by General Counsel.

" 28—Hearing set July 18, 1934 on settlement.

Jul. 16—Consent to settlement filed by taxpayer.

" 23—Decision entered, Div. 9, Mr. Van Fossan.

Oct. 9—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

" 25—Proof of service filed. (2) Taxpayer and attorney.

Dec. 4—Motion to extend time to 2/8/35 to complete the record filed by General Counsel.

" 4—Order enlarging time to 2/8/35 for preparation of evidence and delivery of record entered.

" 28—Agreed statement of evidence lodged.

1934

Dec. 28—Praecipe filed—proof of service thereon.

" 31—Agreed statement of evidence approved and ordered filed. [1*]

APPEARANCES

For Taxpayer:

V. K. BUTLER, Jr., Esq.,

For Comm'r:

H. D. THOMAS, Esq.

Docket No. 60699

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1931

Nov. 30—Petition received and filed. Taxpayer notified. (Fee paid)

" 30—Copy of petition served on General Consel.

Dec. 32—Answer filed by General Counsel.

" 28—Copy of answer served on taxpayer. Circuit Calendar.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1933

Jul. 3—Hearing set for week of Sept. 11, 1933 at San Francisco, Calif.

Sep. 19—Hearing had before Mr. Van Fossan, Div. 9 on merits. Briefs due Nov. 5, 1933—no exchange.

Oct. 16—Transcript of hearing of Sept. 19, 1933 filed.

Nov. 1—Motion for extension to 12/5/33 to file brief filed by taxpayer. 11/2/33 granted.

Dec. 2—Motion for extension to Dec. 26, 1933 to file brief filed by General Counsel. 12/5/33 granted both sides.

" 22—Motion for extension to Jan. 8, 1934 to file brief filed by taxpayer. 12/26/33 granted.

" 26—Memorandum brief filed by General Counsel.

1934

Jan. 8—Brief filed by taxpayer.

Apr. 27—Opinion rendered, Mr. Van Fossan, Div. 9. Decision will be entered under Rule 50.

Jun. 26—Notice of settlement filed by General Counsel.

" 28—Hearing set July 18, 1934 on settlement.

Jul. 16—Consent to settlement filed by taxpayer.

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Dec. 4—Motion for extension to 2/8/35 to complete record filed by General Counsel.

" 4—Order enlarging time to 2/8/35 for preparation of evidence and delivery of record entered.

" 28—Agreed statement of evidence lodged.

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" 31—Agreed statement of evidence approved and ordered filed.

United States Board of Tax Appeals

Docket No. 55537

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing the bureau symbols IT:AR:E-6 AHB-60D) dated February 5, 1931, and as a basis for this proceeding alleges as follows:

a. The petitioner is a national banking association organized and existing under and by virtue of the National Bank Act of the United States, with its principal banking offices located at 400 California Street, San Francisco, California.

b. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A"), was mailed to the petitioner on February 5, 1931.

c. The taxes in controversy are income taxes for the [3] calendar year 1928 and the amount of the deficiency claimed is $2,439.76. The amount of the tax in controversy (as nearly as may be determined) is the said amount of said deficiency, to wit, $2,439.76.

d. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The Commissioner of Internal Revenue erred in including in petitioner's taxable income interest in the amount of $20,331.40 accrued to petitioner on tax exempt securities during the taxable year herein involved.

e. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(1) Petitioner purchased from R. H. Moulton & Company certain state, federal and municipal bonds and other securities, all of which were of the classes, interest upon which is totally exempt from taxation, under the provisions of the Federal Revenue Act of 1928, and particularly under

the provisions of subdivision (b) of section 22 thereof. Said R. H. Moulton & Company executed agreements to repurchase said securities, each of which agreements was substantially in the form of the agreement attached hereto, made a part hereof, and marked Exhibit "B". [4]

Each of said agreements of repurchase fixed the repurchase price of the security, made up of the principal amount specified, and the accrued interest, at the coupon rate, to be paid by said R. H. Moulton & Company if repurchase of said securities were made. Each of said agreements of repurchase further specified that maturing interest coupons were to be the property of petitioner. All coupons for interest upon said securities maturing after the date of purchase of the said securities by petitioner and prior to the date of repurchase thereof by said R. H. Moulton & Company were clipped from said securities and cashed by petitioner, and none of said coupons or interest was ever delivered to, credited to, or paid to said R. H. Moulton & Company. During the taxable year herein involved petitioner regularly employed in keeping its books and in reporting its taxable income the accrual method of accounting. During the taxable year herein involved $20,331.40 of interest on said tax exempt securities accrued to petitioner, being all of the interest accrued on said securities during the period of their ownership in said year by petitioner, namely, from and after the purchase thereof by petitioner and prior to the repurchase by said R. H.

Moulton & Company of such of said securities as were repurchased.

Petitioner held legal title to said securities and the interest coupons thereon at all times between the dates of sale and repurchase thereof. If the right of resale and repurchase were not exercised in any particular case, petitioner would be and remain the unqualified and absolute owner of the [5] securities involved, not as pledgee foreclosing a lien, but on account of the title acquired by it at the time of purchase. Said R. H. Moulton & Company had no right to substitute other bonds of equal value for those purchased by petitioner and was not required to pay any interest upon the amounts paid by petitioner on account of the purchase of said securities nor to pay a stated rate of interest thereon regardless of the coupon rate or maturity or market value of said securities, nor to pay any interest whatever, other than the accrued interest on said securities at the date of repurchase thereof, computed in the same manner as is customary in all transactions for the purchase and sale of bonds. No relationship of borrower or lender ever existed between petitioner and R. H. Moulton & Company during the taxable year herein involved with respect to the transactions herein involved.

Petitioner alleges on information and belief that the said interest in the amount of $20,331.40 accrued to petitioner on said securities during the taxable year herein involved is exempt from tax under the provisions of the Federal Revenue Act of 1928, and

particularly under the provisions of subdivision (b) of section 22 thereof.

Wherefore, your petitioner prays that this Board may hear the proceeding and redetermine the deficiency in accordance with the facts herein alleged, and for such other relief as to this Board may seem proper.

V. K. BUTLER, JR.,
FELIX T. SMITH,
Counsel for Petitioner. [6]

State of California,
City and County of San Francisco.—ss.

Wm. R. Pentz, being duly sworn, deposes and says: That he is an officer, to-wit, the Vice President of THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, the petitioner named in the foregoing petition, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

WM. R. PENTZ

Subscribed and sworn to before me this 31st day of March, 1931.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [7]

EXHIBIT "A"

NP-2-28

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to

Feb 5 1931

The Bank of California, N. A.,
400 California Street,
San Francisco, California.

Sirs:

You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $2,439.76 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this

agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By W. T. SHERWOOD

Acting Deputy Commissioner.

Enclosures:

Statement

Form 882

Form 870

Schedules 1 to 5, inclusive. [8]

STATEMENT

IT:AR:E-6
AHB-60D

Returns Examined

Parent Company	Year	Form
The Bank of California, N. A., San Francisco, California	1928	1120 (Consolidated return)
Subsidiary Companies		
The San Francisco and Fresno Land Company, San Francisco, California.	1928	1122
Inland Irrigation Company, Tacoma, Washington.	1928	1122
Port Walter Herring and Packing Company, Seattle, Washington,	1928	1122

Tax Liability

The Bank of California, N. A.

Year—1928
Tax Liability—$95,246.86
Tax Assessed—$92,807.10
Deficiency—$2,439.76

The adjustments producing the result stated above are based on a revenue agent's report, and are explained in the attached schedules 1 to 5, inclusive.

The consolidated tax assessed and corrected tax liability have been allocated to the various companies on the basis of the net income properly as-

signable to each as provided in section 142(b) of the Revenue Act of 1928, and results in the allocation of the entire deficiency to your company. See schedules 3, 4 and 5.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1928 the Bureau will be unable to afford you an opportunity under the provisions of article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency. [9]

The Bank of California, N. A.
Year ended December 31, 1928

Schedule 1
Net Income

Net income as disclosed by return	$779,319.90
As corrected	799,651.30
Net adjustment	$ 20,331.40
Unallowable deductions and additional income:	
(a) Interest not reported	$20,331.40

Explanation of Items Changed

(a) In connection with the transactions whereby your corporation advanced to the Moulton and Company the value of certain municipal bonds upon the assignment of same to you, in which you were guaranteed against loss under a repurchase agreement, it is held by the Bureau

that such interest is taxable in accordance with the decisions in the cases of First National Bank of Wichita and Brown-Crummer Company, B. T. A. volume 19, #5, pages 745 and 750.

Schedule 2

Consolidated Net Income

Net income as corrected:	
The Bank of California, N. A.	$799,651.30
San Francisco and Fresno Land Company	182,070.08
Port Walter Herring and Packing Company	9,783.07
Total	$991,504.45
Net losses as corrected:	
Inland Irrigation Company, Incorporated	7,386.42
Consolidated net income	$984,118.03

Schedule 3

Computation of Tax

Income Tax

Consolidated net income	$984,118.03
Income tax at 12 per cent	$118,094.16
Less:	
Income taxes paid to a foreign country	2,188.69
Total tax assessable	$115,905.47

[10]

Schedule 4

Allocation of Tax Assessed on Consolidated Return Before Deducting Foreign Tax Credit.

Company	Income Reported	Per Cent	Amounts
The Bank of California, N. A.	$779,319.90	80.2452	$ 92,807.10
The San Francisco and Fresno Land Company	182,070.08	18.7474	21,682.19
Port Walter Herring and Packing Company	9,783.07	1.0074	1,165.11
Totals	$971,173.05	100	$115,654.40

Allocations of Corrected Tax Liability

Company	Income Reported	Per Cent	Amounts
The Bank of California, N. A.	$799,651.30	80.6533	$ 95,246.86
The San Francisco and Fresno Land Company	182,070.08	18.3601	21,682.19
Port Walter Herring and Packing Company	9,783.07	.9866	1,165.11
Totals	$991,504.45	100	$118,094.16

Schedule 5

Computation of Deficiency

The Bank of California, N. A.		
Correct tax liability		$ 95,246.86
Less:		
Income taxes paid to a foreign country		2,188.69
Balance of tax		$ 93,058.17
Tax previously assessed (account No. 400909)	$113,465.71	
Amount allocated to subsidiaries	22,847.30	90,618.41
Deficiency		$ 2,439.76

[11]

Schedule 5
(continued)
Computation of Deficiency
(continued)

The San Francisco and Fresno Land Company	
Correct tax liability	$21,682.19
Tax previously assessed	21,682.19
Deficiency	none
Port Walter Herring and Packing Company	
Correct tax liability	$1,165.11
Tax previously assessed	1,165.11
Deficiency	none

[12]

EXHIBIT "B"

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller", agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer", agrees to buy the following bonds, namely:

$45,000 CITY & COUNTY OF SAN FRANCISCO WATER 4½% BONDS

Numbers and denominations as follows:

$ 5,000	July 1, 1945	Nos. 25510/14
40,000	" 1, 1948	28162/4
		28168/92
		26603/4
		28126/35

The purchase price of each bond is as follows: (Plus accrued interest)

July 1, 1945 maturity @ 100
July 1, 1948 " @ 100

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 3rd day of January, 1928.

THE BANK OF CALIFORNIA, N. A.
A. H. Holley
Vice-President

R. H. MOULTON & COMPANY
By Elmer Booth

[Endorsed]: Filed April 6, 1931. [13]

[Title of Court and Cause—Docket No. 55537.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

a. Admits the allegations contained in paragraph a of the petition.

b. Admits the allegations contained in paragraph b of the petition.

c. Admits the allegations contained in paragraph c of the petition.

d. Denies that the respondent erred in the manner alleged in paragraph d of the petition.

e. Denies each and every allegation contained in paragraph e of the petition which is inconsistent with or contrary to the determination of the Commissioner as shown in the deficiency letter, a copy of which is attached to the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.
amm—4-27-31

[Endorsed]: Filed Apr. 28, 1931. [14]

[Title of Court and Cause—Docket No. 60699.]

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing the bureau symbols IT:AR: E-6 CEC-60D) dated October 30, 1931, and as a basis for this proceeding alleges as follows:

(a) The petitioner is a national banking association organized and existing under and by virtue of the National Bank Act of the United States, with its principal banking office located at 400 California Street, San Francisco, California.

(b) The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A"), was mailed to the petitioner on October 30, 1931.

(c) The taxes in controversy are income taxes for the [15] calendar year 1929 and the amount of the deficiency claimed is $1,620.52. The amount of the tax in controversy (as nearly as may be determined) is the said amount of said deficiency, to wit, $1,620.52.

(d) The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The Commissioner of Internal Revenue erred in including in petitioner's taxable income interest in the amount of $14,731.98 accrued to petitioner on tax exempt securities during the taxable year herein involved.

(e) The facts upon which the petitioner relies as a basis of this proceeding are as follows:

1. Petitioner purchased from R. H. Moulton & Company certain state, federal and municipal bonds and other securities, all of which were of the classes, interest upon which is totally exempt from taxation, under the provisions of the Federal Revenue Act of 1928, and particularly under the provisions of subdivision (b) of section 22 thereof. Said R. H. Moulton & Company executed agreements to repurchase said securities, each of which agreements was substantially in the form of the agreement attached hereto, made a part hereof, and marked Exhibit "B". Each of said agreements of repurchase fixed the repurchase price of the security, made up of the principal amount specified, and the accrued interest, at the coupon rate, to be paid by said R. H. Moulton & Company if repurchase of said securities were made. Each of said agreements [16] of repurchase further specified that maturing interest coupons were to be the property of petitioner. All coupons for interest upon said securities maturing after the date of purchase of the said securities by petitioner and prior to the date of repurchase thereof by said R. H. Moulton & Company were clipped from said securities and cashed by petitioner, and none of said coupons or interest was ever delivered to, credited to, or paid to said R. H. Moulton & Company. During the taxable year herein involved petitioner regularly employed in keeping its books and in reporting its taxable income the accrual method of accounting. During the taxable year herein involved $14,731.98 of interest on said tax exempt securities accrued to petitioner, being

all of the interest accrued on said securities during the period of their ownership in said year by petitioner, namely, from and after the purchase thereof by petitioner and prior to the repurchase by said R. H. Moulton & Company of such of said securities as were repurchased.

Petitioner held legal title to said securities and the interest coupons thereon at all times between the dates of sale and repurchase thereof. If the right of resale and repurchase were not exercised in any particular case, petitioner would be and remain the unqualified and absolute owner of the securities involved, not as pledgee foreclosing a lien, but on account of the title acquired by it at the time of purchase. Said R. H. Moulton & Company had no right to substitute other bonds of equal value for those purchased by petitioner and was [17] not required to pay any interest upon the amounts paid by petitioner on account of the purchase of said securities nor to pay a stated rate of interest thereon regardless of the coupon rate or maturity or market value of said securities, nor to pay any interest whatever, other than the accrued interest on said securities at the date of repurchase thereof, computed in the same manner as is customary in all transactions for the purchase and sale of bonds. No relationship of borrower or lender ever existed between petitioner and R. H. Moulton & Company during the taxable year herein involved with respect to the transactions herein involved.

Petitioner alleges on information and belief that the said interest in the amount of $14,731.98 accrued

to petitioner on said securities during the taxable year herein involved is exempt from tax under the provisions of the Federal Revenue Act of 1928, and particularly under the provisions of subdivision (b) of section 22 thereof.

Wherefore, your petitioner prays that this Board may hear the proceeding and redetermine the deficiency in accordance with the facts herein alleged, and for such other relief as to this Board may seem proper.

V. K. BUTLER, JR.,
FELIX T. SMITH,
Counsel for Petitioner. [18]

State of California,
City and County of San Francisco—ss.

WM. R. PENTZ, being duly sworn, deposes and says: That he is an officer, to-wit, the Vice President of THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, the petitioner named in the foregoing petition, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to the matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

WM. R. PENTZ.

Subscribed and sworn to before me this 24th day of November, 1931.

[Notarial Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [19]

EXHIBIT "A"

NP-2-C-29

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to

Oct. 30, 1931.

The Bank of California, N. A.
400 California Street,
San Francisco, California.

Sirs:

You are advised that the determination of your tax liability and that of your affiliated companies for the year(s) 1929 discloses a deficiency of $1,620.52 as shown in the statement which is attached to and made a part of this letter.

In accordance with section 272 of the Revenue Act of 1928 and Article 16 of Regulations 75 relating to consolidated returns of affiliated corporations prescribed under section 141(b) of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability and that of your affiliated companies.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the en-

closed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By J. C. Wilmer,

Deputy Commissioner.

Enclosures:

Statement

Form 882

Form 870-C-29

Schedules 1 to 7 inclusive [20]

STATEMENT

IT:AR:E-6
CEC-60D

Returns Examined

Parent Company	Form	Year
The Bank of California, N. A., San Francisco, California.	1120	1929
Subsidiary Companies:		
The San Francisco and Fresno Land Co., San Francisco, Calif.	1122	1929
Inland Irrigation Co., Inc., Tacoma, Washington.	1122	1929
Port Walter Herring and Packing Co., Seattle, Washington	1122	1929
Umptanum Sheep Company, Portland, Oregon	1122	*

*April 3, 1929 to December 31, 1929

Tax Liability

Tax liability of The Bank of California, N. A., and each subsidiary company above named as provided for in article 15(a) of Regulations 75 prescribed under section 141(b) of the Revenue Act of 1928.

Year—1929.

Tax Liability—$160,239.00.

Tax Assessed—$158,618.48.

Deficiency—$1,620.52.

In accordance with article 16(a) of Regulations 75, the deficiency will be assessed severally against each corporation named above.

The deficiency shown herein is based upon the report dated April 22, 1931 prepared by Revenue Agent, Hugh T. Fellers, and transmitted to you under date of May 11, 1931, which report is made a part hereof, and upon the adjustments as shown in the attached schedules numbered 1 to 7, inclusive. [21]

Due to the fact that the issue relative to the taxability of interest received in connection with municipal securities assigned to your corporation under repurchase agreements, was also an issue in the taxable year 1928 and a petition has been filed for that year with the United States Board of Tax Appeals, an opportunity has not been afforded you under the provisions of article 451 of Regulations 74, to discuss your case for 1929 before the mailing of a formal notice of determination as provided by section 272(a) of the Revenue Act of 1928. [22]

The Bank of California, N. A.

Year ended December 31, 1929

Schedule 1

Net Income

Net income as disclosed by return	$1,166,504.66
As corrected	1,181,236.64
Net adjustment	$ 14,731.98
Unallowable deduction and and additional income:	
(a) Exempt interest overstated	$ 14,731.98

Explanation of Items Changed

(a) In transactions whereby your corporation advanced funds to R. H. Moulton and Company to the value of certain municipal bonds upon the assignment of these bonds to you, it is held by the Bureau that interest received in connection therewith is taxable for the reason that you held these securities subject to a repurchase agreement. This is in accordance with the decision of the United States Board of Tax Appeals in the case of the First National Bank in Wichita v. Commissioner of Internal Revenue published in 19-B. T. A.-744.

Schedule 2

San Francisco and Fresno Land Co.

Net Income	
Net Income as disclosed by return	$308,080.55
As corrected	308,080.55
Net adjustment	None

Schedule 3

Inland Irrigation Company, Inc.

Net Income	
Net income as disclosed by return	$ 60.00
As corrected	60.00
Net adjustment	None

The Bank of California, N. A.

Year ended December 31, 1929.

Port Walter Herring and Packing Co.

Schedule 4

Net Income

Net income as disclosed by return	$29,903.82
As corrected	29,903.82
Net adjustment	None

Schedule 5

Umptanum Sheep Company.

Period April 3, 1929 to December 31, 1929.

Net Loss

Net loss as disclosed by return	$44,347.23
As corrected (loss)	44,347.23
Net adjustment	None

Schedule 6

Consolidated Net Income

Net income as corrected:	
The Bank of California, N. A.	$1,181,236.64
San Francisco and Fresno Land Co.	308,080.55
Inland Irrigation Company	60.00
Port Walter Herring and Packing Co.	29,903.82
Total	$1,519,281.01
Net loss as corrected:	
Umptanum Sheep Company	44,347.23
Consolidated net income	$1,474,935.78

[24]

The Bank of California, N. A.

Year ended December 31, 1929.

Schedule 7

Computation of Tax

Net income for taxable year	$1,474,935.78
Income at 11%	$ 162,242.72
Less: Taxes paid to a foreign country	2,003.72
Total tax assessable	$ 160,239.00
Tax previously assessed, account #430011	158,618.46
Deficiency	$ 1,620.52

[25]

EXHIBIT "B"

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller" agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer" agrees to buy the following bonds, namely:

$45,000 CITY & COUNTY OF SAN FRANCISCO WATER 4½% BONDS

Numbers and denominations as follows:

$ 5,000	July 1, 1945	Nos. 25510/14
40,000	" 1, 1948	28162/4
		28168/92
		26603/4
		28126/35

The purchase price of each bond is as follows: (Plus accrued interest)

July 1, 1945 maturity @ 100
July 1, 1948 " @ 100

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 3rd day of January, 1928.

THE BANK OF CALIFORNIA, N. A.
A. H. Holley
Vice-President
R. H. MOULTON & COMPANY
By Elmer Booth

[Endorsed]: Filed Nov. 30, 1931. [26]

[Title of Court and Cause—Docket No. 60699.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(a) Admits the allegations contained in paragraph (a) of petition.

(b) Admits the allegations contained in paragraph (b) of petition.

(c) Admits the taxes in controversy are income taxes for the calendar year 1929 and the amount of the deficiency claimed is $1,620.52. Denies the remaining allegations contained in paragraph (c) of petition.

(d)(1). Denies that the respondent erred in the manner alleged in paragraph (d)(1) of the petition.

(e)(1). Denies the material allegations of fact appearing in paragraph (e)(1) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the

increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Dec. 23, 1931. [27]

[Title of Court and Cause—Docket Nos. 55537, 60699.]

Promulgated April 27, 1934.

The evidence establishes that the transactions in question were actual purchases by taxpayer of tax-free securities as short-term investments and not loans with the securities as collateral, notwithstanding the fact that repurchase agreements were entered into at the time the securities were purchased by taxpayer. Accordingly, the coupon interest paid on such securities was properly received by taxpayer and taxpayer is exempt from tax on the same under section 22 (b) (4) of the Revenue Act of 1928.

V. K. Butler, Jr., Esq., for the petitioner.
H. D. Thomas, Esq., for the respondent.

OPINION.

VAN FOSSAN: These proceedings were brought to redetermine deficiencies in the income taxes of

the petitioner for the years 1928 and 1929 in the sums of $2,439.76 and $1,620.52, respectively.

The petitioner alleges that the respondent erred in including in its taxable income interest aggregating $20,331.40 and $14,731.98 accrued to the petitioner on tax-exempt securities during the years 1928 and 1929, respectively.

The petitioner is a national banking association, organized and existing under the National Bank Act of the United States, with its principal banking office in San Francisco, California. R. H. Moulton & Co. was engaged in the investment banking business in that city and specialized in municipal bonds. Practically all of the securities in which it dealt were tax-exempt.

During 1928 and 1929 the petitioner purchased from R. H. Moulton & Co. and other investment dealers certain tax-exempt state, Federal, and municipal bonds and obligations of other political subdivisions. The purchases were made either upon the application of the investment bankers, who held or had commitments for large blocks of bonds [28] which they could not carry themselves, or upon the request of the petitioner, which had available surplus funds desirable for use in obtaining short-term investments. The purchase price was based on, but usually under, the market price plus accrued interest to the date of sale at the coupon rate. Upon the payment of the agreed price, the securities were delivered to the petitioner under a bill or memorandum of sale. Simultaneously, the petitioner and the "seller" entered into the following standard

form of agreement (the blanks being filled in to constitute a typical case):

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller." agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer," agrees to buy the following bonds, namely:

$7,000 CITY OF HANFORD MUNICIPAL IMPROVEMENT 5% BONDS

Numbers and denominations as follows:

$2,000	Aug. 1,	1958	Nos.	173/74
4,000	"	1961	"	186/89
1,000	"	1963	"	199

The purchase price of each bond is as follows: (Plus accrued interest)

August 1,	1958	maturity	@ 95
"	1961	"	@ 95
"	1963	"	@ 95

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or

its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 11th day of July 1929.

THE BANK OF CALIFORNIA, N. A.
STUART F. SMITH
Vice-President.
R. H. MOULTON & COMPANY
[Signed] By ELMER BOOTH

The transactions under discussion were entered on the petitioner's books as a credit to the seller at the full amount of the purchase price plus accrued interest and were listed and carried in an account called "Bond Account No. 2," to facilitate their expeditious [29] handling. The petitioner treated its bonds held under the repurchase agreements exactly as it did all its bonds and other investments. Upon the maturity of a coupon attached to a bond it was collected by the petitioner and the proceeds

credited to the account "Interest on Investments" on its general ledger. In that account all interest from bonds of whatever nature owned by the petitioner was entered. In its call and semiannual statements the bonds subject to repurchase were included in its list of bonds and other investments owned by it. The long-term investments carried by the petitioner in its "Bond Account No. 1" and its short-term investments entered in its "Bond Account No. 2" were treated exactly alike from an accounting viewpoint. Likewise, the interest derived from both classes of investments was so treated. The practice was not challenged by the Comptroller of the Currency.

The sale price set in the repurchase agreement was always exactly the same as the original purchase price. The petitioner and the investment dealer adhered strictly to the terms of the repurchase agreement. No supplementary agreement was made to enlarge, modify, or in any way to affect the original agreement or the acts of the parties thereunder. If the bonds were not repurchased at the expiration of the period named in the agreement no extension was given, but occasionally an entirely new agreement was executed, accompanied by a new bill of sale at a price based on the current market. At times the petitioner did not agree to a new contract and the bonds would be repurchased by the dealer and sold to another bank. Often the investment banker repurchased at intervals portions of the bonds held by the petitioner under the repurchase agreement.

The yield to the petitioner under the repurchase agreements was less than that received from collateral loans. The petitioner often made loans to customers with tax-exempt securities as collateral.

The petitioner kept its books on the accrual basis.

The amount of interest in controversy, aggregating $20,331.40 and $14,731.98, respectively, during the years 1928 and 1929, was computed by adding the amount of the matured coupons actually cashed by the petitioner, the amount of the accrued interest received by it upon resale, and the amount of interest accrued on the bonds held by the petitioner at the close of the year, and subtracting therefrom the amount of accrued interest paid by the petitioner upon the original purchases from the investment dealers.

The petitioner contends that the transactions described constituted an outright sale from the investment dealers to it and that, hence, the interest accrued and received while the bonds were so owned [30] and held by it were exempt from taxation under section 22 (b) (4)[1] of the Revenue Act of

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[1](b) Exclusions from gross income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:
* * * * * * * *

(4) Tax-free Interest—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. * * *

1928. The respondent's position is that, in substance, the transactions represented loans made by the petitioner to the dealers with the tax-exempt bonds hypothecated therefor and that, therefore, the interest on such bonds belonged to the dealers and not the petitioner. Consequent on this position respondent added the amounts of the interest to petitioner's income as interest received on loans.

In his brief respondent's counsel asks us to disregard entirely the form of the sale, the repurchase agreement, and the whole transaction and to read into it a "substance" consonant with his theory that it was merely a loan. To do so, we would be compelled not only to disregard the contractual relation established by documentary proof and the practical treatment of the interest received, but also to ignore the testimony of witnesses, some of whom were the respondent's own. It is true that from the Moulton Co.'s viewpoint the financial support of the petitioner was useful in obtaining and placing tax-free securities, such as municipal, district, county, and State bonds, but petitioner's primary object was plainly to benefit itself by securing an attractive investment for its idle funds. It is obvious that when a financial institution finds itself overburdened with an excessive amount of cash which it can not lend through ordinary channels, it must seek and obtain short-term investments which will yield some returns, usually at less than the current interest rate, yet will permit a prompt conversion into cash when needed. Such short-term

investments were bankers' acceptances, commercial paper, and tax-exempt securities. All were bought by the petitioner as it found opportunities so to do.

The respondent stresses the fact that the Moulton Co. could repurchase at any time and in any number of units the bonds transferred to the petitioner. We attach no particular significance to this privilege other than that it indicates the flexibility of the repurchase contract. However, the contract also contains this paragraph:

> In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer. [31]

Thus, whenever the petitioner needed to convert its short-term investment into cash for use in the normal course of business, it had the right to tender such bonds as it desired to resell and if the Moulton Co. were unable to purchase any or all of such bonds, petitioner could dispose of them on the market. This provision is inconsistent with the theory that the transaction was a loan.

Counsel for both the petitioner and the respondent rely on our decision in First Nat. Bank in Wichita, 19 B. T. A. 744; affd., 57 Fed. (2d) 7. A careful analysis of the facts of that case shows

clearly that it suppports the petitioner's position rather than that of the respondent. There we said:

> It seems clear that at the time the petitioner solicited this business from the Brown-Crummer Co. it had on hand a large surplus of unemployed funds and that that company was in the market for loans. The maximum amount of credit the petitioner could extend to this company by way of a direct loan, under the law, was $200,000; this credit it readily gave to the company upon its collateral note. The company, however, required amounts greatly in excess of this; and, since it was dealing in large issues of municipal securities which constituted approved banking investments, the sale with repurchase agreement was evolved and brought into play. The petitioner contends that through this process it acquired a complete title to these bonds which the repurchase agreement in no way impaired, and that, because of that fact, the interest payments were its income, and being tax-exempt, it was entitled to exclude them from its income-tax returns. We think there could be no question as to the soundness of the petitioner's contention had it taken title to these securities subject to no conditions other than is evidenced by the repurchase agreements; however, other established facts show that other considerations formed the motives of the parties to the transactions.
>
> The question here, as we view it, is not dependent upon who held the bare legal title to

the bonds during the dates of sale and repurchase, but rather upon the broader issue as to who, under the understanding between the bank and its customers, was entitled to receive, and who, as carried out, did receive the interest payments made by the issuing authorities of such bonds when collected and paid. The record shows that the true relationship between the petitioner and its customers, in these transactions, was that of a lender of money in consideration for the legal rate of interest payable on the amount advanced, and not that of an investor in the securities assigned to it by such customers. The history of these transactions and the manner in which they were carried out can lead to no other conclusion.

In reviewing the case, the Circuit Court of Appeals commented thus:

> There is no doubt of the exemption from income taxes of the interest on these securities in favor of the person or persons who were entitled to receive it and did receive it. So, the issue is one of fact.
>
> * * * * * * *
>
> It is contended that the written contract made by the parties when the bonds were delivered passed legal title to the bonds in the bank, and by force thereof interest on them was the bank's property. There is no doubt that the [32] form of contract might have been carried out in that way, but the blanks in the contract submitted

> to the comptroller left an opportunity to the bank of which it availed itself, and the practice as carried on by the parties clearly shows that it was never intended that the bank should be entitled to the interest accruing on the bonds. Conceding that under the contract the legal title to the bonds was in the bank, the uniform conduct and practice of the parties was a joint admission that the interest coupons and their proceeds when collected did not belong to the bank, but were the property of Brown-Crummer Company. They were collected by Brown-Crummer Company and applied to its use and benefit.
>
> * * * * * * *
>
> * * * The bank got none of the interest that accrued on the bonds. It was not entitled to it. Brown-Crummer Company paid the bank all its interest charges.

The facts in the cited case are very different from those in the case at bar. There the bank paid par, not market value, for the bonds, and was guaranteed against loss. The interest was the current loan rate—not the coupon rate. There, upon the maturity of the interest coupon, the bank clipped the coupon and delivered it to its customer; here, the petitioner collected the coupon and credited the proceeds thereof to its own interest account. In the Wichita case the customer made monthly interest adjustments on its loans without reference to the coupons collected or interest due from the tax-exempt securities. In the instant case no such

method was employed. There, unlimited withdrawals and substitutions of bonds were permitted and made. Here, the same securities were made the subject of resale and no substitutions, withdrawals, or renewals were contemplated or allowed.

Furthermore, in the repurchase contract under consideration the petitioner was not required to account to the Moulton Co. for any surplus upon a sale, but could hold that company for any deficiency. Under California law the petitioner would be required to account for the surplus from the sale of collateral or under a chattel mortgage. (Code of Civil Procedure, sec. 3008.)

Moreover, the record shows that no special considerations or conditions other than those set forth in the contract motivated the actions of the parties. In this respect the case at bar differs basically from the First Nat. Bank in Wichita case. As we view the repurchase agreement, it granted to the Moulton Co. the right to purchase upon stated terms certain securities which were the property of the petitioner and to which petitioner had title. At most, the agreement might have restricted petitioner's ability to sell to a third person with knowledge, but that possibility could have no effect on its ownership of the property. The right to collect the interest coupons and the benefit of the accrued interest on the bonds were [33] natural incidents to that ownership. The treatment of interest by the parties is corroborative of this conclusion.

There is no evidence that the repurchase plan was a device contrived for the purpose of tax eva-

sion or even tax avoidance. On the contrary, the record indicates that the arrangement was a well established custom in San Francisco banking circles, resulting from the bank's need to put its surplus funds to work, but in such form as to be liquid and constantly available.

In view of the facts in the case before us, we are of the opinion that the tax-free securities belonged to petitioner and that the interest received by and accrued to the petitioner from such securities as were covered by the repurchase agreements as above set forth is exempt from taxation under the provisions of section 22 (b) (4) of the Revenue Act of 1928.

Reviewed by the Board.

Decision will be entered under Rule 50.

TRAMMELL dissents. [34]

United States Board of Tax Appeals
Washington

Docket Nos. 55537, 60699

THE BANK OF CALIFORNIA,
NATIONAL ASSOCIATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the opinion of the Board promulgated April 27, 1934, the respondent herein on

June 26, 1934, having filed a notice of settlement and proposed computation and the petitioner having on July 16, 1934, filed an acquiescence in the computation as made by the respondent, now therefore, it is

ORDERED and DECIDED: That there are no deficiencies in Federal income tax due for the years 1928 and 1929.

[Seal] (s) ERNEST H. VAN FOSSAN,
Member.

Entered, July 23, 1934. [35]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Harold D. Thomas, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his

office by virtue of the laws of the United States. That the respondent on review (hereinafter referred to as the taxpayer) is a national banking association, organized and existing under the National Bank Act of the United States, with its principal office in San Francisco, California, and filed its Federal income tax returns for the years 1928 and 1929 involved herein with the Collector of Internal Revenue for the First District of California at San Francisco, California, and the office of said Collector [36] is located within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

That the nature of the controversy is as follows, to wit:

In 1928 and 1929 the taxpayer, under and by virtue of agreements hereinafter described, received interest in the amounts of $20,331.40 and $14,731.98 respectively. These amounts were not reported as taxable income by the taxpayer on its income tax returns for said years. R. H. Moulton and Company and other investment dealers purchased, at market, tax-exempt securities from outside parties. Upon the purchase of such securities they immediately went through the form of selling same to the taxpayer and the taxpayer at the same time and as part of the same transaction entered into a contract, designated "repurchase agreement" to resell the same identical securities to R. H. Moulton & Company and the other investment dealers at the end of ninety days or at any time within ninety days

if the latter so desired. All of these transactions in 1928 and 1929, with the exception of a few, were with one investment dealer, R. H. Moulton & Company, and these two were precisely along the same lines as the others.

The price at which the securities were taken over by the taxpayer was usually 1 to 5 points under the market price. The figure at which R. H. Moulton & Company was to take back the securities from the taxpayer was always the same price, at which the taxpayer had acquired the securities. R. H. Moulton & Company, at its option, could take back the securities before the expiration of the ninety day period and was also privileged to reacquire any portion thereof from time to time within the ninety days. [37]

By means of these transactions the taxpayer very frequently furnished the money to R. H. Moulton & Company to make the original purchase of the tax-exempt securities. In many instances R. H. Moulton & Company sold to its customers a portion of the securities held by the taxpayer under repurchase agreements and would exercise the repurchase agreement to the extent of obtaining such portion of said securities necessary for making delivery to the customer.

In case R. H. Moulton & Company failed to take up the securities by the end of the ninety day period, the taxpayer could sell the same for the best price obtainable and charge the loss, if any, to the account of the former. The securities held by the taxpayer by virtue of these transactions were carried by R. H.

Moulton & Company on its books as its own assets and the obligations under the repurchase agreements as its liabilities. The taxpayer in its loans on collateral to any one firm or person was limited by the banking laws to 10% of its capital and surplus and it was believed by the taxpayer that by reason of these transactions it could advance or place more funds with the investment dealers than it could by outright loans to them on collateral.

As consideration for its part in furnishing money for these transactions the taxpayer was permitted to collect the interest coupons on the securities while it was in possession of same. This interest amounted to $20,331.40 and $14,731.98 for 1928 and 1929, respectively, after making adjustment for accrued interest both at the time of the so-called purchase and repurchase and for accrued interest at the close of the year. The Commissioner in determining the deficiencies included the above amounts of interest in taxpayer's taxable net income for the years 1928 and 1929. [38]

III.

That the taxpayer appealed from said determination of the Commissioner to the United States Board of Tax Appeals; that the Board held that such interest was tax-exempt income and should not be included in the taxpayer's income for the year 1928 or the year 1929; that the Board ordered and decided that there were no deficiencies in tax for 1928 and 1929; that the Board's findings of fact and opinion were promulgated April 27, 1934,

and its final order of redetermination adjudging that there were no deficiencies in tax, was entered July 23, 1934.

IV.

That the Commissioner, being aggrieved by the findings and conclusions made by the Board in its said report and also by said order of redetermination desires to obtain a review of said report and order by the United States Circuit Court of Appeals for the Ninth Circuit and as reasons for such a review he alleges that the Board in rendering its findings of fact and opinion and in entering its final order of redetermination committed the following errors:

1. The Board erred in holding that the interest received by the taxpayer was exempt from taxation.

2. The Board erred in failing to hold that the interest received by the taxpayer was taxable to it.

3. The Board erred in failing to find and hold that the interest in question was received by the taxpayer on loans to customers.

4. The Board erred in finding and holding that the taxpayer received the interest in question as the owner of tax exempt securities.

5. The Board erred in holding that the securities in question were purchased by the taxpayer. [39]

6. The Board erred in finding that the taxpayer treated the bonds held under the repurchase agreement as it did all its bonds and other investments.

7. The Board erred in failing to find that the repurchase agreements were always carried out.

8. The Board erred in finding and holding that the taxpayer was not required to account to the Moulton Company for any surplus on a sale.

9. The Board erred in finding that no special considerations or conditions other than those set forth in the contract motivated the actions of the parties.

10. The Board erred in failing to find that the transactions in the form of sales and repurchases of the securities in question were occasioned by the desire of the parties to circumvent or avoid the banking restrictions under which the taxpayer in its loans on collateral to any person or firm was limited to 10% of its capital and surplus.

11. The Board erred in failing to find that at all times R. H. Moulton & Company treated the securities in question as its own.

12. The Board erred in failing to find that very frequently the taxpayer furnished the money to R. H. Moulton & Company to make the original purchase of the tax-exempt securities.

13. The Board erred in failing to find that in many instances R. H. Moulton & Company sold to its customers some of the securities held by the taxpayer and would exercise the repurchase agreement to the extent of obtaining securities necessary for delivery to the customer.

14. The Board erred in holding and deciding that there are no deficiencies in tax for the years 1928 and 1929. [40]

15. The Board erred in not holding and deciding that there are deficiencies in tax for the years

1928 and 1929 in the respective amounts of $2,439.76 and $1,620.52.

WHEREFORE, the Commissioner petitions that said report and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the laws and with the rules of said Court and be transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN
Assistant Attorney General.
(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Of Counsel:
HAROLD D. THOMAS,
Special Attorney,
Bureau of Internal Revenue. [41]

United States of America,
District of Columbia.—ss.

HAROLD D. THOMAS, being duly sworn, says that he is the Special Attorney, Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge

except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

HAROLD D. THOMAS

Sworn and subscribed to before me this 3rd day of October, 1934.

(Sgd) GEORGE W. KREIS,
Notary Public

My commission expires Nov. 16, 1937.

[Endorsed]: Filed Oct. 9, 1934. [42]

[Title of Court and Cause.]

To: V. K. Butler, Jr., Esq.,
Standard Oil Building,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 9th day of October, 1934.

(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 17 day of October, 1934.

(Sgd) V. K. BUTLER, JR.,
Attorney for Respondent on Review.

[Endorsed]: Filed Oct. 25, 1934. [43]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: The Bank of California, National Association,
400 California Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 9th day of October, 1934.

(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 17 day of October, 1934.

(Sgd) J. J. DANTES
Cashier,
The Bank of Califorinia, San Francisco,
Respondent on Review.

[Endorsed]: Filed Oct. 25, 1934. [44]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Ernest H. Van Fossan, Member of the United States Board of Tax Appeals on September 19, 1933. V. K. Butler, Jr., Esq., appeared for the taxpayer and E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, appeared for the Commissioner.

Prior to the taking of testimony, upon motion made by taxpayer's counsel, the cases were ordered consolidated for hearing.

JAMES JOSEPH HUNTER

was called as a witness by and on behalf of the taxpayer, and having been first duly sworn, testified as follows:

Direct Examination.

I am Vice President of the Bank of California, the petitioner. As to my duties—I have charge of

(Testimony of James Joseph Hunter.)

the loans, or at least a considerable oversight of the loans and the branch credits, the foreign departments, somewhat supervisory in the latter, but that is the main activity. That includes my familiarity with the investment policies of the bank, as well as loan practices of the bank. During the course of the years 1928 and 1929 which are involved in this proceeding, it was the practice of the bank from time to time to purchase bonds subject to repurchase agreements. The practise and procedure in that regard was this. From time to time the bank would have money that they felt justified in putting out in various types of short term loans, as well as long term loans, and under the short term investments, which would be buying commercial paper, treasury notes, or these repurchase agreements, which we were in a position—we had the stipulation that if these people such as Moulton would take them up within the specified time, they were the equivalent of any other short term investment. If not, we felt we were in a position to sell it and accomplish the same purpose. As to how the price was paid in our negotiations for the purchase of these bonds subject to repurchase agreements, the price was fixed —well in connection with the subject that is under discussion here, dealing with tax exempts, because we bought other securities that were not tax exempt; on the repurchase agreement the price was fixed on the yield base and the yield, the tax exempt phase of it was allowed in the yield, because we

(Testimony of James Joseph Hunter.)

didn't expect to take any benefits from the tax exemption. We did not make any arrangement for interest with the persons from which we purchased securities, other than the stipulation that the interest accrued on the bonds while owned by us should be our property. They were our securities; we treated them as such all the way through our records.

Whereupon counsel for the respective parties stipulated that the net amounts of income derived by the bank from the bonds held by it under repurchase agreements were $20,331.40 and $14,731.98 respectively for the years 1928 and 1929 and that the amount for each year was made up as follows: The sum of three factors, first, coupons actually cashed by the bank during the year from securities held by it under the transactions under review, plus accrued interest actually received by the bank on resale of these securities to the investment dealer, [45] plus interest accrued at the end of the year on bonds held by the bank under these transactions, a resale not yet having been made, and deducting from such sum the accrued interest paid by the bank to the investment dealer selling the securities to it on the purchase in the first instance.

The witness then identified the credit book of the Bank of California and testified:

This is the record of credits that come into the departments that handle these transactions; that was the note department in the first instance. This is the book of original entry.

(Testimony of James Joseph Hunter.)

The witness was then shown a document, purporting to be an original repurchase agreement entered into by the bank with R. H. Moulton & Company relating to $7,000 face value City of Hanford municipal improvement bonds, and, attached thereto, another document purporting to be a bill of sale of the same date from R. H. Moulton & Company to the Bank of California recording sale of the bonds to the bank at 95 and accrued interest, or a total of $6,805.56; and testified:

Those are the original documents taken from the files of the bank and they evidence the transaction which they purport to represent with R. H. Moulton.

Said documents were offered and received in evidence as

(Testimony of James Joseph Hunter.)

PETITIONER'S EXHIBIT NO. 1,
with right to substitute a photostatic copy thereof.

[Endorsed]: Petitioner's Exhibit 1. Admitted in evidence Sep. 19, 1933.

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco
405 Montgomery Street

New York Los Angeles
San Francisco, California.

Sold to—Bank of California, N. A.

San Francisco, July 11, 1929

$7,000 City of Hanford Municipal Improvement 5% Bonds			
@ 95		$6,650.00	
2,000	Aug. 1, 1958		
4,000	" 1961		
1,000	" 1963		
Int: 5 months 10 days		155.56	$6,805.56

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 173/74-186/89-199
$5,000— 8/3/29
1,000—10/14/29
1,000—11/2/29 [71]

(Testimony of James Joseph Hunter.)

REPURCHASE AGREEMENT

THE BANK OF CALIFORNIA, N. A., San Francisco, California, a National Banking Association, hereinafter termed "Seller," agrees to sell, and R. H. MOULTON & COMPANY, hereinafter termed "Buyer," agrees to buy the following bonds, namely:

$7,000 CITY OF HANFORD MUNICIPAL IMPROVEMENT 5% BONDS

Numbers and denominations as follows:

$2,000	Aug. 1,	1958	Nos.	173/74
4,000	"	1961	"	186/89
1,000	"	1963	"	199 [72]

The purchase price of each bond is as follows: (Plus accrued interest)

August	1, 1958	maturity	@ 95
"	1961	"	@ 95
"	1963	"	@ 95

payable in United States gold coin of the present standard of weight and fineness, which sum Buyer hereby agrees to pay on or before ninety days from date hereof. Maturing coupons to be the property of THE BANK OF CALIFORNIA, N. A.

And THE BANK OF CALIFORNIA, N. A., hereby agrees on tender of said purchase price of such bonds and interest as aforesaid to deliver to R. H. MOULTON & COMPANY or its nominee, the bonds as above, at any time hereafter, prior to any default on the part of the Buyer.

(Testimony of James Joseph Hunter.)

It is further understood between the two parties hereto that partial sales and deliveries may be made at the rates stated above.

In the event of any failure on the part of the Buyer to accept and pay for any one or more of said bonds at the time the same is tendered, the Seller shall be released from all obligation in law or equity hereunder and may sell all bonds remaining in its hands without notice and for the best price obtainable, charging the loss, if any, to the account of the Buyer.

Executed in duplicate this 11th day of July 1929.

THE BANK OF CALIFORNIA, N. A.
STUART F. SMITH
Vice-President
R. H. MOULTON & COMPANY
By ELMER BOOTH.

The witness then testified:

This precise printed form of repurchase agreement was uniformly used in all of our transactions for the purchase of bonds subject to repurchase agreement. The same form would cover every transaction by the bank in the purchase of bonds, subject to repurchase agreement, during the two years 1928 and 1929, here involved. At the time of the purchase it was the uniform practise to receive a [46] bill of sale from the dealer making the sale to us, in the form of the bill of sale attached to this bond.

(Testimony of James Joseph Hunter.)

The entry of this transaction of July 11th was made in the credit book right here,—"R. H. Moulton & Company". It is entered as a credit to R. H. Moulton & Company, $7,000. Hanford Municipal Improvement 5s at 95 and interest, $6,805.56. This is a handwritten record in a bound volume. It is the original entry. This book of records shows the treatment given the coupons on these bonds due August 1st, 1929; it is on page 107 here in this same credit book—we have interest on investments, proceeds, Aug. 1st coupons, $7,000, City of Hanford $175, under "coupon interest on investments" which is written or impressed in rubber stamp opposite this precise entry; "interest on investments" is the rubber stamp; they used that for that, but the balance of it is continued in handwriting, and the same thing applying here. (indicating) I refer now to the first entry to which I previously referred, $6,805.56. This went to the credit of Moulton when we bought it of them.

As to the next step in the accounting system of the bank with reference to the crediting of the $175. in the general ledger, there is an interest tag made out, called "Interest on Investments" which would go through the routine of the bank and land up in the general ledger department to go to the credit of interest on investments. The interest from the permanent investments of the bank that were held in what we call the Coupon Department were also credited to the general account,

(Testimony of James Joseph Hunter.)

"Interest on Investments". The Coupon Department is a different department that handled that, because they were only referred to at stated times. Our treatment of interest on what I have described as these short term investments [47] under repurchase agreement was precisely the same as our treatment as to interest derived by the bank from investments of the long term portfolio.

As to the resale to R. H. Moulton & Company on August 3rd of $5,000 par value of these same Hanford bonds, this volume indicates or records that transaction; on August 3rd bond account number two was credited with $4,750, representing $5,000. City of Hanford Municipal Improvements at 5. The entry with reference to accrued interest at date of resale was interest on investments, two days interest on that, making $1.39. That entry was treated in exactly the same way as coupon interest to which I have just testified, and it was entered in the general ledger with the general interest on investments held by the bank. As to the bill of sale indicating that on October 14th an additional bond was resold, on October 14th bond account number two is credited with $1,000 City of Hanford Municipal Improvement, 5, 95, $950 with two months, 13 days interest, $10.14. That represents the accrued interest since August 1st; and that entry was treated in precisely the same manner as the other two items about which I have testified. As to the bill of sale indicating the last bond sold November 2nd, the entry is on November 2nd bond account No. 2

(Testimony of James Joseph Hunter.)

credited, $1,000 City of Hanford Municipal, 95 $950, with 3 months and one day interest to the interest on investments, treated exactly the same way, $12.64.

This transaction which I have followed from its inception to its conclusion was absolutely typical of every transaction involving the purchase of bonds subject to repurchase agreement had during the two years under review; and all interest received was treated in precisely the same way.

Upon examination by the presiding member the witness testified:

Typical in that the procedure was the same but different transactions varied—different securities, and the record of them would vary in the number [48] of transactions involved in the handling of those securities; the repurchase might be handled in one transaction, or half a dozen. The repurchase agreement provides for partial purchases. As to whether we ever had instances in which the same bonds would be the subject of subsequent transactions, that would be rather difficult, because it might be—I couldn't say demanded—the demand but considered—it would be a separate transaction, each transaction, as we have in the handling of grain sometimes we see the same warehouse receipt in several different accounts, and back into the same account originally.

Whereupon the witness on direct examination by Mr. Butler identified three purchase slips of R. H. Moulton & Company taken from the records of

(Testimony of James Joseph Hunter.)

the bank, one dated August 3, 1929 reading "R. H. Moulton and Company, San Francisco" and thereunder "Bought of Bank of California, N. A." itemizing the $5,000. Hanford bonds, and two other similar ones dated October 14, 1929 and November 2, 1929. Said three slips were offered and received in evidence as

PETITIONER'S EXHIBIT NO. 2,

with right to substitute photostatic copies thereof.

[Endorsed]: Petitioner's Exhibit 2. Admitted in evidence Sep. 19, 1933.

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco

405 Montgomery Street

New York Los Angeles

San Francisco, Aug. 3, 1929.

Bought of—Bank of California, N. A.,
San Francisco, California.

$5,000 City of Hanford Municipal Improvement 5% Bonds		
@95	$4,750.00	
4,000 Aug. 1, 1961		
1,000 " 1963		
Interest 2 days	1.39	$4,751.39

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 186/9-199 [73]

(Testimony of James Joseph Hunter.)

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco

405 Montgomery Street

New York Los Angeles

San Francisco, Oct. 14, 1929.

Bought of—Bank of California, N. A.,
San Francisco, California.

$1,000 City of Hanford Municipal Improvement 5% Bond Aug. 1, 1958 @95	$ 950.00	
Int: 2 months 13 days	10.14	$ 960.14

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 173. [74]

(Testimony of James Joseph Hunter.)

Specializing in Municipal Bonds

R. H. MOULTON & COMPANY

San Francisco

405 Montgomery Street

New York Los Angeles

San Francisco, Nov. 2, 1929.

Bought of—Bank of California, N. A.,
San Francisco, California.

$1,000 City of Hanford Municipal Improvement 5% Bonds		
Aug. 1, 1958 @95	$ 950.00	
Int: 3 months 1 day	12.64	$ 962.64

Dated: Aug. 1, 1923
Int: F & A 1
Denom: $1000
Nos: 174 [75]

The witness on direct examination then testified:

These three purchase slips are the form used and are typical of all our transactions in which sales were made by us of bonds held under repurchase agreement, subject only to the distinction which your Honor has pointed out, that there were different amounts, different securities, and at times different dealers involved.

When the Comptroller of Currency periodically issued his call, the bonds returned by us in our statement, which were subject to repurchase agree-

(Testimony of James Joseph Hunter.)

ments were handled as property of the bank, in the same way that our own—the two accounts were combined for the government comptroller reports. In the statement we would [49] have one item, let us say loans and discounts, and in that we listed all notes, bills receivable, bank acceptances, and things of that kind. In another item we would have bonds, and under bonds we would include all our government—long term, short term government or municipal, industrial. In our statement we listed bonds held subject to repurchase agreement in the same manner as we returned all other bonds owned by the bank.

Upon examination by the presiding member the witness testified:

Referring to the combining of the two accounts in making up the statement I meant the two bond accounts. For convenience, we kept those under which there was a repurchase agreement in a separate account, which we called bond account No. 2; because they were frequently—somebody wanting to buy them back, we kept them in a different place, where they were more convenient to the public, at least to our customers that were handling them in that way. It was just a matter of convenience.

The book which was identified and to which I referred was a book from the note department. All the transactions that are handled in that particular department are recorded in that book—loan discounts, repurchase agreements of all classes. You

(Testimony of James Joseph Hunter.)

see the officers on the note desk are more familiar with handling securities, they are senior men and are handling them frequently in connection with securities, and we felt that they were better equipped to give good service to our clients than if we put it back in the coupon department, where it is not as accessible to the public, and they are not as familiar with handling them. That is merely a matter of convenience, not of the principle involved.

The witness on direct examination by Mr. Butler then testified:

I have referred to these two bonds accounts; bond account No. 1 was the long term investment account—bond account No. 2 evidenced or covered bonds held by us under repurchase agreements. But it is true that the interest accrued to or derived from bond account No. 1 and bond account No. 2 was treated in precisely the same way and entered in the general bank account of interest on investments. In the call statement and in the published statement put out by the bank, the bonds held in bond account number one and bond account number two were returned as one single aggregate sum representing bonds owned by the bank. We so considered them. This practise of the bank was not challenged by the Federal examining authorities when we made our returns.

The witness then identified a sheet headed "Bond account number two, R. H. Moulton & Co." relating to the transaction regarding the City of Hanford $7,000 face value accruing in 1929, and testified:

(Testimony of James Joseph Hunter.)

This is the ledger record of the City of Hanford Municipal Improvement bonds we purchased from them. This is our permanent ledger record evidencing the detail and posting of the various transactions which I have assembled and described in my earlier testimony. [51]

Whereupon said sheet was offered and received in evidence as

PETITIONER'S EXHIBIT NO. 3

with right to substitute a photostatic copy thereof.

(Testimony of James Joseph Hunter.)

[Endorsed]: Petitioner's Exhibit 3. Admitted in evidence Sep. 19, 1933.

R. H. MOULTON

Bond Account No. 2 City of Hanford Municipal Improvement

(Title of Bond)

Dated Aug. 1, 1923 Maturity Serial 1933/42 Interest @ 5% Payable Feb. 1 & Aug. 1 1907

	Date 1929		PARTICULARS		DEBIT Par	DEBIT Cost	Rate	CREDIT Par	CREDIT Sale	INTEREST Debit	INTEREST Credit
91	July 11	7/1000	173/4-186/9-199	Various	7000	6650	95			155.56	
107	Aug 2	Proceeds Aug 1st cpns. credited to int. acct.									175.00
108	3	5/1000	186/9-199	Various			95	5000	4750		1.39
155	Oct. 14	1/1000	173	"			95	1000	950		10.14
169	Nov. 2	1/1000	174	1958			95	1000	950		12.64
	June 1 5,1932	5/1000	121/4-129	Various	5000	4600	92			93.06	93.06
	July 1	5/1000	121/41-129	"			92	5000	4600		11.11
	11	15/500	52/6-58/65-67-70	"	7500	6825	91			166.67	
											55.55
	14	5/500	63/5-67-70	"			91	2500	2275		1.05
											88.88
	16	8/500	53/56-59/62				91	4000	3640		2.79
									5915		22.24
	28	2/500	52 & 58	1933-36			91	1000	910		2.34

[76]

(Testimony of James Joseph Hunter.)

The witness further testified:

If we purchased bankers acceptances and discount commercial paper for the account of the bank those investments would be carried at the note desk. That is for the same element of convenience that I have testified with reference to the bonds. That was done because of the frequency of the turnover, due to the short term character of the transaction. Formerly, before the recent bank act, the banks were permitted to lend money on securities for other banks, and we held those in that department. They weren't our own department but they were held at the note desk. But with reference to bankers acceptances and short term commercial paper, that was our practice.

Upon examination by the presiding Member of the Board, the witness testified:

As to when we first adopted this method of dealing with tax exempt securities, we first adopted the method of dealing on repurchase agreements in, I think, about 1923, 1924 or 1925. I am not very clear as when it was. As to the advantages of dealing with the securities in this manner, it was an opportunity to put our money on a short term basis, and it also gave us the opportunity in case of need, advancing more money than—or at least putting our clients into possession of more money than we could lend them if the lending process were used. It differs from a loan in that we actually agree—we buy them actually, and we give them the right to repurchase them within a stipulated time. We

(Testimony of James Joseph Hunter.)

feel that we have the complete ownership of those, subject to that, and as soon as that time is up, they are our securities. As to how it differs from a loan on collateral from the standpoint of or advantage to the bank, it is rather a diffi- [52] cult line to draw; that is the reason I suppose we are here today. We have the money—the outlet for the money. It suited our purpose to have short term things like that, and as a matter of fact, that would apply to loans. We could call a loan if we had a call loan out. Of course, we haven't such a thing as call loans in San Francisco. There is no real market, active market. The market is very thin, so we haven't such a thing as call loans. For that reason—at least that is among the factors.

As to whether the bank bought any short term municipal paper or securities without repurchase agreements, we bought lots of governments, short term U. S. Governments. Regarding the factor, determining the procedure from the standpoint of the bank, as to whether we bought outright without repurchase agreements or whether we had a repurchase agreement, there wasn't any really important factor that decided it. If one of our clients—if it suited us to make a short term purchase, these securities that we bought on the short term basis on this repurchase agreement, they were usually a long term item. We couldn't—there would be very few 90 days—securities maturing in 90 days. They were long term bonds but short term purchase agreements.

(Testimony of James Joseph Hunter.)

As to whether we bought outright without repurchase agreements other bonds of a similar kind, there were very few of that type offered, or at least those short terms that were offered on the market. We would buy them when we could get them and put them away for short term investments.

Whereupon the questions of the presiding Member of the Board and the answers of the witness were as follows:

Q. Now, you spoke of the opportunity to lend more money to the customer, or advance more money, was your term.

A. Place the funds with them.

Q. To advance more money to the customer in this manner than you could on [53] a loan. I don't quite understand that.

A. Well, banks have a limit to which they could lend to any customer, their capital and surplus, ten per cent of their capital and surplus.

Q. That is by state law?

A. No, by national.

Q. By national?

A. Yes, and by state, too, as a matter of fact. It is a fairly uniform practice.

Q. And you could avoid that restriction by employing this means?

A. Well, it wasn't exactly a question——

Q. I impute nothing by the term "avoid".

A. Yes, we could buy from these people a couple of million dollars worth of good securities, while we could only lend a million and a half for our bank.

(Testimony of James Joseph Hunter.)

Q. Well, from the standpoint of the customer, how does the net result of this transaction differ from that for a loan on collateral?

A. Well, the customer got a better rate than we would make a note desk loan for.

Upon further examination by the presiding Member the witness testified:

The price at which we agreed to resell bore a substantial relation to the market price, but it was fixed at the time we originally purchased; as to whether it took into account fluctuation that might occur subsequently, it wasn't an exact thing. There would be, I think, in most cases probably it was a little under the market. The price at which we sold back to the customer was always the same price at which we purchased; always the same price, with the accrued interest of course. The client got the benefit of any advantage in rates that accrued between a tax, for instance, and a non-tax. The bank got no [55] benefits from any of the tax exemption phase of it. The client of the bank got the benefit of any advantage that there was in the price as a result of the tax exemption, but the bank got no benefit of the tax exemption.

On further direct examination by Mr. Butler the witness testified:

I mean—in the rate that was fixed, or the yield that was fixed through the price agreed upon it reflected the tax exemption. And that benefit inured to the investment dealer selling to us, by reason of the lower yield to the bank. But I did not mean

(Testimony of James Joseph Hunter.)

to admit that the bank waived any right to tax exemption from the interest and the coupon received, while in its possession.

Cross Examination.

On cross examination the witness testified, as follows:

With respect to these purchases and repurchases we have been talking about, repurchase was always made; sometimes they were made by repurchasing the total amount covered by one purchase agreement and sometimes by taking back at repurchase a portion at a time. Quite frequently these transactions would probably be entered into upon the suggestion or solicitation of the bank. When we get long in funds, for instance, overnight funds, we are sometimes very long in cash money overnight, and we will call up different people to see if they can use money overnight, and we buy a great many bankers acceptances on that basis, on the repurchase agreement basis. The bank sometimes has idle funds which they are glad to invest or glad to get some return of interest on, rather than have them remain idle.

The yield that we figure out depends upon the price of purchase. The bank gets the coupon rate, and the yield is necessarily related to the purchase price. If the purchase price is under market the yield is greater than the face of the bond; if the price is higher, it is lower than that. [55]

(Testimony of James Joseph Hunter.)

All investments purchased by the bank are not handled by the note department. All of our investments are by no means covered by purchase and repurchase agreements. All the bonds held by the bank were not in bond account No. 2; just those under the repurchase agreements were included in account No. 2. In our report to the Comptroller, grouping these bonds in controversy with all other bonds, there was no other item that affects these particular bonds; we don't set up a contingent liability for the repurchase agreements. Contingent liabilities are not a practise in banking. It is not a practise to set those up.

Until quite recently we discourged demand loans. As a matter of fact we had some notes which were demand, but we didn't consider them demand, notes payable on demand. We would take them payable on demand for a specific purpose, that if certain things happened we wanted to put ourselves in the position of making demand, but we didn't take demand notes in the ordinary course of banking. They were demand loans in the event we had to demand the money but as a matter of practise I cannot recall a case where we did demand. There is a limit on the amount of money we may loan to one particular person. During the years 1928 and 1929 we often made loans to people on collateral and the collateral received was often in tax-exempt securities of the kind in question.

Under the arrangements with R. H. Moulton & Company, when we purchased such bonds we would

(Testimony of James Joseph Hunter.)

pay them the interest that was accrued at the face value of the bonds. When we sold them back to R. H. Moulton & Company we would receive accrued interest on the same basis; the coupon rate would be accrued in both the sale and purchase by us. The amount of accrued interest on purchase and on sale would depend entirely upon the particular date of purchase and sale. As to whether sometimes the interest accrued on the sale was greater than the amount we paid on the purchase of the same security and other times, vice versa,—it depended on the coupon rate. It is entirely a coupon rate transaction, the [56] interest phase; we might buy it a few days after a coupon date, in which case we would pay probably a few dollars accrued interest, and they mightn't be taken up until after the next coupon date, and it might actually be less than that. If we purchased a few days before a coupon date, we would pay them a considerable amount of interest and collect the coupon—and when they repurchased them, there would be just a small amount of interest—but you would have to add the coupon interest, the amount of the coupon to the accrual subsequent to the coupon, to know the total amount the bank received, and then deduct the amount that we paid. It is all based on the coupon date. As to whether in some cases the interest accrued on sale was more than the interest accrued on purchase and in other cases the reverse —you must combine the two of them to get the

(Testimony of James Joseph Hunter.)

picture, because always the interest that we would receive would be more than the interest we paid, because that is our investment in the meantime. Leaving out any interest that we would collect by reason of the coupon clipped, we might pay them more interest than we collected from them, but that would be just a pure matter of mechanics. As to whether there was any particular date during these years that was fixed so as to make our date of purchase either shortly before or shortly after the due date of interest on the bonds—that was all a matter of incident, not principle. I testified that the price at which these bonds were fixed in the purchase and in repurchase was usually under the market price.

Redirect Examination

Upon redirect examination the witness testified:

When I testified that generally the price agreed upon was less than the market price, I gave it as my recollection that it was slightly under it. [57]

Recross Examination

Upon recross examination the witness testified:

By slightly under I mean probably one to five per cent. It might be as much as five per cent under the market.

Redirect Examination

Upon further redirect examination the witness testified:

It is a pretty fair statement to say that with respect to a number of the types of securities held

(Testimony of James Joseph Hunter.)

under these repurchase agreements, it was frequently the fact that the bonds in substantial quantities did not have a ready market in case the bank wished to sell the block. That is a factor which should have entered into our determination in fixing market price.

L. A. WILTON

was called as a witness by and on behalf of the taxpayer and having been first duly sworn, testified as follows:

Direct Examination

I am Auditor of the Bank of California. Some of the books of the bank are kept on the accrual basis and some are not. For income tax purposes the bank is on the accrual basis.

Here the taxpayer rested.

V. E. BREEDEN,

was called as a witness by and on behalf of the Commissioner and having been first duly sworn, testified as follows:

Direct Examination

I am vice-president of R. H. Moulton & Company in charge of the San Francisco office, connected with the firm since 914. In 1928 and 1929 I was vice-president of the company and manager

(Testimony of V. E. Breeden.)

of their San Francisco office. R. H. Moulton & Company are investment bankers, specializing in municipal bonds. As to whether we were dealers exclusively in municipal, county, or state bonds ordinarily [58] known as tax exempts, I should say not exclusively—possibly one-half of one per cent of our business might be brokerage transactions, corporation bonds or Canadian municipals that might go through. Ot least 99 per cent of our business was dealing in bonds ordinarily known as tax exempts. As to whether it was necessary to borrow substantial sums of money in order to carry these bonds or securities—it was necessary to finance the business either through borrowings, or through the sale of the bonds, the temporary sale and repurchase of the bonds. As to whether there was a large amount of borrowed capital at all times including the years 1928 and 1929—I would't say borrowed capital; we have our own capital. During that period of time we had contingent liability on repurchase agreements to purchase bonds back we had sold. We did practically all the business on the sale of securities under repurchase agreements; the actual borrowed money we used during that period was very small, occasional transactions.

I should say 99 per cent of our business was done through purchase and repurchase agreements. All of our business was not done with the Bank of California. We did business with many banks here in San Francisco, particularly with the Wells Fargo

(Testimony of V. E. Breeden.)

Bank; in Los Angeles with the Security National Bank, Citizens National Bank; and in New York with various New York banks. We always had on hand an inventory of securities much larger than our own capital. I am familiar in a general way with these alleged purchase and repurchase agreements that we have been talking about, and I was present to hear the other testimony. Very frequently these so-called sales to the bank and repurchase agreements were entered into contemporaneously with the purchase of bonds by R. H. Moulton & Company, but very frequently it might not happen on the same day. There might be no understanding at all. My position was predicated by the [59] knowledge that I knew that various banks in this community and other communities were interested in buying bonds upon repurchase, and I was in a position to make a commitment on bonds, and then frequently made my arrangement after the commitment was made. In other words, there is more or less of a constant market for this type of repurchase, of sale and repurchase.

If we wanted to purchase some of these bonds and didn't have the necessary capital we sometimes made arrangements with the bank whereby these bonds we were purchasing could be sold to the bank under an agreement by which we could repurchase them. We have always carried out these repurchase agreements. The bank has never refused to carry them out. Frequently we took back only a part of

(Testimony of V. E. Breeden.)

the bonds covered by a particular agreement, depending on the size of the repurchase agreement; we might have one covering $500,000 County and City of San Francisco bonds, and I might have occasion to exercise that repurchase is part. I might not buy the entire $500,000 worth of bonds back at one time. The agreement itself calls for the resale of all or any part at a stipulated price.

As to whether these bonds were turned over to the bank, the bank bought the bonds from us and signed an agreement to resell them to us. The agreement covered the sale to the bank and a reciprocal agreement to resell and repurchase back over a period that might run ten days, might run sixty days, might run ninety days, depending on the negotiations that we made with our banker. It was in the agreement that any time we wanted to get any of those bonds back before the expiration of the agreed time, we could get them back at the agreed price, and as a matter of fact that was frequently done.

If we had a sale to a customer and sold to a customer some of the bonds which had been sold to the bank under this arrangement, we would then go to the bank and repurchase those bonds for delivery to the customer. That transaction [60] would take place in many instances and did take place.

Upon examination by the presiding Member of the Board the witness testified:

The advantage to R. H. Moulton & Company of this type of transaction was this—We were able to

(Testimony of V. E. Breeden.)

sell securities to our bankers under an agreement to repurchase them at any time, and it enabled us to conduct our business in such a way that when we distributed these bonds in smaller blocks, because we bought wholesale largely, we could go to the bank and demand repurchase according to the agreement. Furthermore, the transaction—there was no limitation on the amount of bonds that the banks could buy. In other words, the banks could buy as many bonds as they wished, and if our bankers or any bank was willing to buy two million dollars worth of bonds from us on repurchase agreement on a mutually satisfactory price, it was a desirable transaction from our viewpoint. If we were handling our business otherwise, why we might be restricted in our financing. The bank was really carrying our inventory for us. That is what it really amounted to. The banks had certain surplus funds, and it was a very desirable form of investment for the bank, the purchase of these bonds with the agreement of resale back to us and our agreement to repurchase. They had short term funds that were looking for investment, and the prices on these repurchase agreements were settled through negotiations between the bankers and ourselves at what they felt was the current rate, or the rate in which they might be interested in making the purchase.

As to the advantage of this plan over a sale or a loan with collateral, the mechanics of it were sim-

(Testimony of V. E. Breeden.)

pler, and if—due to the large amount of money we use in our business, we have a large volume of transactions, and we would have to be doing business with a great many different banks in order to get or [61] obtain sufficient funds, so it is much simpler to make use of this instrument under repurchase agreements. The bank is limited in its loan under collateral to ten per cent of the capital and surplus to one firm.

These repurchase agreements were a definite commitment to repurchase at or before the expiration of a certain number of days. None of them were ever allowed to expire without completing the repurchase. That would be a violation of our contract. Some of them were allowed to go to the expiration day, and then prior to the expiration day they would be extended. As to whether we would in effect enter into another agreement, it would be an absolutely new deal, new price, and new terms, and would have to be satisfactory to the bank. If I had a repurchase agreement maturing on the 1st of June and I wished to extend the repurchase agreement, if it was agreeable to the bank, I would call up one of the bank officers and call his attention to the fact that this repurchase agreement was going to expire on the 1st of June, and I would ask him if it would be agreeable to him to make another repurchase agreement running a stated length of time at a stated price, and he would say either he would or would not. If he wouldn't, then I would have to arrange to make—

(Testimony of V. E. Breeden.)

either make a loan, or else I would have to go and find some other investor interested in carrying it.

We never had a case where they refused to extend. They never refused to extend or enter into a new purchase agreement. Allow me to correct a statement there. We have had times when our bank, one of our banks might say to us they would prefer to terminate the transaction on or before the repurchase date, and in that case, we might make a repurchase agreement with some other bank that were in funds. In other words, the bank might want to use the funds in different channels, might have a more attractive arrangement to make for the [62] investment of their funds, and in many cases our repurchase agreements were terminated on that basis, the bank saying, "We would prefer not to use as much money as you are using. We have not as much money for investment in this type of securities."

The mechanics of consummating an extension or new purchase and repurchase would be this. I would call my banker on the telephone, or call on him personally, and I would say, "I have a repurchase agreement here covering $100,000 State of California 4 per cent bonds, due 1940, upon which the agreement is effective at 98 and accrued interest, and we would like to effect a new agreement, new repurchase agreement at 98 and accrued interest," and the banker might say, "Well, I believe the money market has changed and I would like to make this at 95," or we might say, "We believe conditions

(Testimony of V. E. Breeden.)

have changed in the last 60 days and you should make this agreement at 101," and the banker might say, "Well, due to our cash position, in view of the demands from other sources, we would prefer not to make another repurchase agreement." In that case, I would have to go to another bank and arrange a transaction.

On such an occasion checks would change hands. We would exercise the original repurchase, and hand the check to the bank and cancel that agreement, and then we would make another sale to the bank of the securities, at whatever the stipulated price was, on a new repurchase agreement. In that particular case one transaction would be against the other, except that the check goes through the bank's books. Many times we would pay one bank with a check on another bank. As to whether we ever paid one bank with the check of another bank where we were extending a repurchase agreement, my cashier would have to answer that question; I am not familiar with that detail; that is handled in the cashier's department and I couldn't answer that question. I don't know. I [63] supervise the transaction and know the general routine of them, but I don't follow the details of each transaction from its inception to its conclusion. As to how many times a repurchase agreement in regard to the same bonds was extended,—under conditions such as we had in the early part of this year, where we had a bank moratorium and complete stagna-

(Testimony of V. E. Breeden.)

tion in the bond market, there was a period when repurchase agreements were carried over several times. There would be several instances where on a given day we sold and also repurchased the same day, and then subsequent to that there would be other transactions of the same kind. There is no reason why those transactions might not continue for an indefinite period as long as the bank was willing to make the purchase and we were willing to make the sale.

Cross Examination.

On cross examination the witness testified:

Concerning the example cited of a second repurchase agreement at the expiration of the period of the first, and the exchange of checks, it is my understanding that in the first instance the check would clear and the two transactions were independent of one another. If a different price were arranged, the check evidencing the repurchase and the check evidencing the subsequent sale must necessarily be for different amounts. Our business depends on our credit, our standing, and we are not going to violate any repurchase agreement.

Had we conducted the major part of our business through collateral loans under the rules, national and state, governing banking practise, we would have been required to supply a margin for our collateral loan. Had we been borrowing on collateral we would have been subject to the limitations placed by the National Bank Act, or the National Act on

(Testimony of V. E. Breeden.)

State banks, that only ten per cent [64] of the capital and surplus of the bank would be advanced to any particular individual. In my opinion, by following the repurchase plan, we were able to obtain our accommodations on a better basis than by paying the current rate of interest on collateral loans.

Redirect Examination.

On redirect examination the witness testified:

These transactions covered by purchase and repurchase agreements were very frequently entered into at the instance of R. H. Moulton & Company; when we needed the money to carry our inventory we would go to the bank and enter into one of these transactions. And sometimes the bank came to us; they did that because they had—I assume it was in view of their very easy money position, and they were looking for an opportunity to invest their surplus funds. Take under present conditions, when you have a plethora of surplus funds, there is not a banker who wouldn't be delighted to have half a million in repurchase agreements, because they are an attractive form of banking investment. We have been solicited out of other money markets very frequently; banks in New York have even requested that they would be glad to have us submit repurchase agreements on securities. In other words, this method of handling securities is very universal, and it is an active market for that kind of accommodation.

(Testimony of V. E. Breeden.)

I cannot be certain whether we had any offers from New York firms for transactions of this kind during 1928 and 1929, but, if my memory has not failed me, we had some requests for repurchase from the East River National Bank about that time. We had chances or offers to enter into these agreements, particularly in 1928, not so much in 1929, because the money market in 1929, the stock market was taking most of the demand for funds.

[65]

J. V. JACOBI

was called as a witness by and on behalf of the Commissioner and, having been first duly sworn, testified as follows:

Direct Examination.

I am cashier of R. H. Moulton & Company and that was my position with them in 1928 and 1929. During those years I had supervision of the keeping of the books of R. H. Moulton & Company. I am familiar in a general way with the arrangements made between R. H. Moulton & Company and the Bank of California in 1928 and 1929 regarding the purchase by the bank of certain bonds and the repurchase of the same by R. H. Moulton & Company. Those transactions are recorded in the books of R. H. Moulton & Company. They are recorded in the general ledger. As an instance of the purchase of bonds by R. H. Moulton & Company and the entry

(Testimony of J. V. Jacobi.)

recording same there is an entry on January 10, 1928, the purchase of $10,000 State of California State Building 4 per cent bonds from R. H. Moulton & Company, New York. Our company purchased them of R. H. Moulton & Company, New York, just the same as any other client or bond house so far as our books are concerned. Bonds due July 2, 1965, purchased at 103, and accrued interest. Bonds were sold to the Bank of California on January 13, 1928, on repurchase, at 95 and accrued interest. At the time they were sold to the Bank of California a repurchase agreement was entered into contemporaneously with their sale. The entry for that sale to the bank was made in the journal. I can find that entry. I have the ledger account right here—a sale to the Bank of California on January 13, 1928 of $10,000 State of California State Building 4 per cent bonds at 95 and accrued interest. The entry was made in the journal and credited to the general ledger. The bond sales to our regular customers are in the bond ledger, a different ledger.

Referring to the same transaction, the other entries of which I have just [66] testified to, our books reflect the entries in connection with the repurchase agreement. On February 1st we repurchased $10,000 State of California State Building 4 per cent bonds from the Bank of California at 95 and accrued interest. This is the repurchase account in the general ledger. Tracing this account

(Testimony of J. V. Jacobi.)

through, showing the amounts of accrued interest—on January 13, 1928 when the bonds were sold to the Bank of California, they were sold for $9,600 plus accrued interest for 11 days, amounting to $12.22. On February 1st, 1928, they were repurchased at the same price plus accrued interest for 29 days, amounting to $32.22. The books reflect the sale of those same bonds to a customer; the bonds were sold on February 1, 1928, to Farmers & Mechanics Bank of Sacramento, at $103.476 per bond. These particular bonds, which I have just testified to, were purchased at approximately 103, sold to the bank at 95 and accrued interest, purchased back from the bank at 95 and accrued interest, and sold to the customer at approximately 103. In connection with the original purchase, that means 103 plus accrued interest and the sale to the customer means at approximately 103 plus accrued interest.

The transactions under these purchase and repurchase agreements with the Bank of California were entered into a separate ledger than the regular transactions of bonds with customers, and entered into a separate ledger from the regular purchase of bonds by R. H. Moulton & Company. As to the position of R. H. Moulton & Company with respect to these bonds at the end of any particular accounting period, the bonds were carried as our assets. These particular bonds which the bank held under repurchase agreement were carried as part of the assets of R. H. Moulton & Company.

(Testimony of J. V. Jacobi.)

Whereupon the following colloquy took place:

Mr. BUTLER: If your Honor please, may I interject at this moment? [67]

I have no disposition to do anything which will prevent throwing all the light possible on this case, and supplying all the facts that may be deemed relevant; but I think it would be well to state that in this case is involved the tax liability of the Bank of California. It was the owner of the bonds, to show how it treated those bonds on its books.

I have purposely avoided objecting to this line of testimony previously, but I will suggest at this time the question is not the treatment of the matter on the books of R. H. Moulton & Company, or any other investment dealer, but the taxpayer itself.

Mr. THOMAS: I think, your Honor, that way it was carried on the books of R. H. Moulton & Company is certainly relevant and competent testimony.

Mr. BUTLER: Moulton might have treated it any way he desired, and it would not be in any way binding upon the taxpayer.

The MEMBER: You may proceed with the evidence.

The witness on direct examination further testified:

These bonds were carried as the assets of R. H. Moulton and Company and the liability, or contingent liability if you want to call it that, for the repurchase of these bonds, was carried on the books as a liability.

(Testimony of J. V. Jacobi.)

Cross Examination

On cross examination the witness testified:

Referring to the eight point spread in the specific instance selected, the differential has been very much less in many cases. There have been cases in which the sales price to the Bank of California was the approximate equivalent of the then general market price. I do not know of any where the price to the bank was higher than the general market price. It would be approximately the same or a little less. This eight point spread is an exceptional case be- [68] cause at that time our inventory was very low and we passed that on to the bank as additional protection for the bonds on which they had no liability.

We never attempted to substitute other bonds for those held by the bank under a repurchase agreement, without the execution of a new agreement. No agreement that we might do so was ever made. As to whether any agreement was ever made with the bank concerning these transactions other than the repurchase agreement itself—none, except it was understood between ourselves and the bank that if they had funds for investment from time to time, that if agreeable to them, we could sell certain bonds on repurchase agreement. To my knowledge R. H. Moulton & Company never entered into any agreement with the bank covering a particular repurchase transaction in any form other than that evidenced by the printed form, nor did R. H. Moul-

(Testimony of J. V. Jacobi.)

ton & Company to my knowledge ever receive any interest, or any refund, or any payment of any kind from the Bank of California obtaining the bonds held under repurchase agreement other than the actual agreed interest computed at the coupon rate, which was paid in the first instance when the bank purchased the bond. We never received any coupon return on any bonds held under repurchase agreement.

Redirect Examination

On redirect examination the witness testified:

The entries as to which I testified a while ago concerning certain bonds purchased by our company from R. H. Moulton & Company, New York, in the amount of $10,000 involved State of California State Building, 4 per cent bonds. As to the general form and running of the transactions through the books, those entries are typical of all our entries in our books with respect to transactions between R. H. Moulton & Company and the Bank of California in [69] connection with alleged sales to the Bank and repurchases by R. H. Moulton & Company.

Here the Commissioner rested.

The testimony of the witnesses having been concluded the following colloquy took place:

Mr. BUTLER: If your Honor please, through a misapprehension, our petitions allege that all of

these transactions for 1928 and 1929 between the Bank of California covering repurchase agreements were with R. H. Moulton & Company. In examining the records recently, it developed there were a few transactions with others, and I have so notified Mr. Thomas. They were, however, along precisely the same lines. In order that the petitions may not contain an innocent misstatement, I would like to make the motion, if I may, that it be amended to read that wherever R. H. Moulton & Company appears as the party to the repurchase agreement with the bank, the words may be added, or the words may be substituted, "R. H. Moulton & Company and other investment dealers."

The MEMBER: There is no objection to that, I assume?

Mr. THOMAS: No objection.

The MEMBER: The record will so stand. [70]

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

V. K. BUTLER, Jr.,
VINCENT BUTLER,
Attorney for Respondent on Review.

[Endorsed]: Lodged Dec. 26, 1934.

[Endorsed]: Approved and Ordered Filed this 31st day of Dec., 1934.

(Sgd) ERNEST H. VAN FOSSAN,
Member.

[Endorsed]: Filed Dec. 31, 1934. [77]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Board in each case.

2. Pleadings before the Board, in each case,

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed, including attached Exhibits Nos. 1 to 3 inclusive.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. [Not included in record.]

7. This praecipe, together with proof of service of a copy of praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 20th day of December, 1934.

V. K. BUTLER, Jr.,
Attorney for respondent.

[Endorsed]: Filed Dec. 28, 1934. [78]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 78, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of January, 1935.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7739. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. The Bank of California, National Association, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 12, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.